Cahaba Resources, Inc. *and* **James Maxwell Chapman.** Case 10–CA–18747

15 February 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 15 July 1983 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cahaba Resources, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you because you engage in protected concerted activity.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer James Maxwell Chapman immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

CAHABA RESOURCES, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: This matter was tried before me on April 22, 1983, at Birmingham, Alabama. The hearing was held pursuant to a complaint and notice of hearing issued by the Regional Director for Region 10 of the National Labor Relations Board, herein the Board, on January 11, 1983, and is based on a charge which was filed on November 29, 1982,[1] by James Maxwell Chapman, an individual, herein Chapman. The complaint in substance alleges that Cahaba Resources, Inc., herein the Respondent, on November 24, discharged, and thereafter failed and refused to reinstate, its employee Chapman because he engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection. The discharge is alleged to have been in violation of Section 8(a)(1) of the National Labor Relations Act, herein the Act. An amendment to the complaint was issued on March 31, 1983. The Respondent filed timely answers, both to the original and amendment to the complaint, wherein it denies the commission of the alleged unfair labor practices.

Upon the entire record made in this proceeding, including my observation of each witness who testified herein, and after due consideration of briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

[1] All dates herein are 1982 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Alabama corporation, maintains an office and place of business in Birmingham, Alabama, where it is engaged in coal mining operations in Bibb County and Shelby County, Alabama. In the course of its business, the Respondent sold and shipped coal valued in excess of $50,000 directly to Drummond Coal Sales, Inc., also located in the State of Alabama, and Drummond Coal Sales, Inc., in turn sold and shipped coal valued in excess of $50,000 directly to customers located outside the State of Alabama. The parties stipulated at the trial, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Brief Background*

The Respondent operates a strip coal mining operation in Bibb County and Shelby County, Alabama. The Respondent commenced its operation in January 1982. The strip mining area of operation worked by the Respondent covers between 80 and 160 acres. In order to strip mine the coal, the overburden, or material on top of the coal, must be blasted away by explosives. After the overburden is removed, the coal is then retrieved from the earth by dragline type operations assisted by dozers. At all times material herein, the Respondent operated one dragline, and it also operated a second dragline from approximately May to July and again from December 1982 until the time of the trial herein. The coal at the Respondent's operation is transported by truck 4 or 5 miles from the pit area to a wash area. The Respondent, during its operation, contracted out the hauling of its coal from the pit area to the wash area with one exception of approximately a 2-month period commencing in July at which time it transported with its own vehicles the coal from the pit to the wash area. Approximately 40 percent of the coal mined is lost in the wash area; or, stated otherwise, there is a 60-percent recovery rate from raw to shippable coal. The coal is shipped out by rail after it leaves the wash area. The employees, at material times herein, were paid an hourly wage plus a royalty bonus of 60 cents per clean ton of coal shipped. The royalty bonus was divided among the hourly paid employees. Based on production and sales, the hourly paid employees took a 10-percent pay cut in July.

B. *Discharge of Chapman*

Chapman worked for the Respondent from February 4 to November 24 as a driller's helper. Chapman was assigned as a helper to Virgil Greer. Chapman and Greer's normal workday was 7 a.m. to 3 p.m.; however, on some days, Chapman and Greer did not receive their work assignments for that day until after 7 a.m. Chapman worked under the supervision of Foreman James Watts.

All employees, including Chapman, from both the 7 a.m. to 3 p.m. work shift and the 3 p.m. to 11 p.m. work shift had a meeting with management at the dragline in early November. Superintendent Hardesty, Foreman Watts, and Management Consultant A. E. Burgess were present.[2] At the early November meeting, the employees found out that two additional employees had been added to those among whom the royalty payment would be divided. The two added employees were parts runner Kenny Gregory and office worker Clark Junkins. Adding two employees to those among whom the royalty payment would be divided caused the overall amount that each employee received to be reduced percentage wise.

Chapman testified the employees took no immediate action regarding the royalty payment, however, they talked about it among themselves thereafter. Chapman stated those discussing it were mechanics Bobby Burleson, Lynn Pate, and Glenn Pope along with Greer and himself. The discussions took place at lunch and in the morning hours before the employees went to work. Chapman asserts the employees discussed the fact that the two added employees had asked the Respondent for a pay raise, but instead of getting an hourly raise they had been given a portion of the other employees' royalty bonus. Chapman stated the employees felt as though they had helped finance a pay increase for employees Gregory and Junkins.

During the second week in November, Chapman and Greer spoke with Foreman Watts about the Respondent adding the two additional employees to the royalty bonus payment. Chapman stated he told Foreman Watts the employees were unhappy that the Respondent had divided the bonus money 23 ways instead of 21 ways without their first being told or asked about it. Chapman asserts Foreman Watts replied that he (Chapman) always had something to say about most anything that came up, and that "he was all the time stirring up trouble and trying to stir up some shit." Chapman explained to Watts that the two employees who had asked for a raise had their raise financed by their fellow workers in that the Respondent added them to the royalty bonus payment.[3]

Approximately during the third week in November, all employees from both work shifts again met at the dragline in the pit area with Superintendent Hardesty and Foreman Watts. The meeting was called to discuss holiday pay. Chapman testified that, when the employees first came to work at the Respondent, it was explained to them that they would receive the same holiday benefits

[2] Burgess at all times material herein was a management consultant for the Respondent. It is undisputed in this record that Burgess hired James Watts and promoted him to foreman. Foreman Watts testified Burgess was good at making suggestions to Superintendent Hardesty and himself on a regular basis with respect to how things ought to be handled at the pit. Burgess made suggestions with respect to where the dragline should be set up and what drilling pattern should be used in spacing and placing explosives to move the overburden from the coal. Further, it is also uncontradicted that Burgess hired driller Greer for employment with the Respondent. I am persuaded that the Respondent has, as alleged by counsel for the General Counsel, placed Burgess in a position with actual authority sufficient to make him an agent of the Respondent within the meaning of Sec. 2(13) of the Act, and I so find.

[3] Greer corroborated the testimony of Chapman with respect to the early November meeting and of the fact that Chapman and others, including himself, discussed the matter among themselves, and that he and Chapman spoke with Foreman Watts about the two extra employees being added to the royalty bonus.

as employees represented by the United Mine Workers Union. The employees were told at this late November meeting that they would not be getting some holidays such as Christmas Eve. During the meeting, the subject of royalty bonus payment was discussed. Mechanic Burleson testified they discussed the fact that the employees were upset about the way the addition of the two employees to the royalty bonus had come about. Chapman testified he stated to the group that he had already discussed the matter with Foreman Watts and again stated the employees were not happy about the way the bonus matter had been handled. Chapman testified he also asked Superintendent Hardesty when the men would receive back the 10-percent cut in pay they had taken in July. Chapman asserted Hardesty replied, after figuring on his calculator, they would receive back in approximately 6 months the 10-percent cut they had taken.[4]

Chapman testified he discussed with his fellow worker Greer the fact that the number of hours they worked was not always accurately kept by the Respondent. Chapman and Greer discussed this matter on numerous occasions as well as specifically on Tuesday, November 23. Chapman and Greer discussed among themselves the fact that there had to be a better way to keep their time and, as a result of their discussion, they decided to raise the matter with Management Consultant Burgess. Chapman wanted to see if Burgess would let them be responsible for their own time and turn it on a weekly basis.

Later that same day, November 23, Chapman and Greer spoke with Foreman Watts. Chapman asked Watts if Management Consultant Burgess would be coming to the vicinity that afternoon. Watts told Chapman that Burgess would be, and Chapman asked if he could talk to Burgess when he got to the pit area. Chapman asserts Watts "stammered around" for a few minutes and then asked him what he wanted to talk with Burgess about. Chapman told Watts he wanted to speak with Burgess to ascertain if there was a better way to keep up with their hours of work. Chapman testified that Foreman Watts "got mad and raised his voice and said, 'If you want to stir up some shit, I can fix you up. . . . You're all the time bitching about something . . . I'll fix a meeting with Mr. Burgess but I'm going to let him know about you not having your coolers in the truck and being ready to go to work at work time, which is 7 o'clock. I've been in the yard several times ten minutes after seven and you wouldn't be ready to go to work.' And he stomped off mad." Chapman testified Watts also told him he was always starting up trouble. Greer corroborated the testimony of Chapman and added that the conversation, "well, it got a little heated and I just made the suggestion that we cool it and go back to work." Greer further testified that Foreman Watts told Chapman before Watts left, "If you want to play these kind of games, both of us can play them." Chapman testified this was the first time he had ever asked for a meeting with Burgess to discuss timekeeping. Chapman testified he did not see Burgess that day.

The next day, November 24, Foreman Watts brought Chapman his paycheck and told Chapman it was his last day of work. Chapman told Foreman Watts okay and immediately proceeded to the yard area at the Respondent's facility. Chapman testified he was looking for Superintendent Hardesty so he could find out what had brought about his discharge. Chapman found Superintendent Hardesty talking to mechanic Burleson, Management Consultant Burgess, and Foreman Watts. Chapman asked Hardesty if he could tell him what had happened. Hardesty told him not really, that Management Consultant Burgess and Foreman Watts had come to him and told him that when he gave Chapman his paycheck it would be a good day to get rid of him. Chapman asked Hardesty if he had found any fault with the way he performed his job. Hardesty told him he had not.

Chapman called Management Consultant Burgess that evening at home and inquired of him what had happened that day, that he felt he had been unfairly dismissed from his job. Burgess told Chapman he was sorry he felt that way. According to Chapman, Burgess stated that Hardesty and Watts needed to make room for a laboratory employee. Burgess told Chapman "they're looking for someone to run the lab and somebody to help Virgil [Greer] on the days that he has got a shot [explosives] to load." Chapman told Burgess if they were going to train someone for that job he believed he could learn to operate the laboratory.

Chapman testified he then called Foreman Watts and asked him what had happened. Watts told Chapman a number of things had happened. One, he had observed Chapman and Greer many mornings without their coolers in their trucks ready to go to work. Chapman testified he told Watts that that reason would not hold water, that when they were not at work it was because either Superintendent Hardesty or Watts had failed to tell Greer and himself what their job assignment would be on that day. Chapman testified Watts then said something about all of the trucks having mechanical problems when Chapman drove them.[5] Chapman testified he told Watts that Burgess had said that the oil plug incident on one of the trucks would not be held against him. Watts then told Chapman that he (Chapman) had something to say about the royalty payment when Junkins and Gregory were added to those among whom the payments were divided. Chapman told Watts that the two employees deserved more money but the way it was done was not fair to the other working employees. Chapman asked Watts if he could say in any way that he had not done his job right, and Watts told him he could not.

[4] Greer and Burleson corrborated Chapman's testimony in essential respects regarding this meeting.

[5] Chapman testified that the Respondent had contracted out the hauling of its coal from the pit to the wash area for a period of time; however, for approximately 2 months, the Respondent transported its own coal in its own trucks from the pit to the wash area. The trucks utilized by the Respondent were old ones that had been part of the equipment owned by Burgess Mining and Construction Corporation. Chapman testified the trucks had transmission problems, they overheated, and had rear-end and drive shaft problems. Chapman stated he had never been disciplined for any matter arising out of his driving a truck. Greer testified employees had a lot of problems with the trucks during the time the Respondent hauled its own coal from the pit to the wash areas. Greer stated he had problems with the trucks he drove, and Chapman's problems with the trucks were no different than problems encountered by any of the other drivers. Greer also confirmed that no drivers were disciplined during this period.

Greer testified that, after Chapman was discharged, he used a driller named Johnny Price to assist him in setting off explosive charges to remove the overburden from the coal. Greer's testimony in this respect was corroborated by Superintendent Hardesty who testified that Price was hired on November 29, which was the first working day after Chapman was discharged on a Wednesday before Thanksgiving.

Pit Foreman Watts testified he told Chapman it was his last day of work on November 24, and he would not be needed anymore. Watts testified Chapman said okay and walked off.

Watts testified Chapman called him at his home the night he was discharged and asked him why he had been laid off. Watts gave Chapman a number of reasons for his discharge. One of the reasons Watts gave for Chapman's discharge was that he was a troublemaker. Watts testified what he meant by troublemaker was "just his attitude toward me in general." Watts further explained that, when he would correct Chapman for driving too fast or correct him for other things, Chapman would make smart remarks back to him. Watts also told Chapman he was discharging him for abusing equipment, not being able to operate equipment safely, being late on the job, and trying to leave the job early. Watts testified that most of the mechanical problems with the trucks during the time the Respondent was hauling its own coal from the pit to the wash area were caused by Chapman.[6]

Watts stated that a couple of days or so after Management Consultant Burgess and Superintendent Hardesty informed the employees that two additional employees had been added to the number of employees that the bonus would be split among, Chapman talked to him about it. Chapman wanted to know why the Respondent had decided to make the change without talking to the employees about it. Watts testified Chapman also wanted to know why the royalty bonus was taken to give the two extra employees a pay raise. Watts testified he did not consider Chapman's questions to be a complaint. Watts testified he was not present at a subsequent meeting with the employees where several pay issues were discussed.

Watts testified there were occasions when Chapman and Greer's work hours were not properly turned in, and it sometimes resulted in their being short hours. Watts acknowledged that Chapman asked him on November 23 if Management Consultant Burgess was coming to the pit area that day and, if he were, he wanted to talk to him. Watts testified that he asked Chapman if there were anything he could do for him, and Chapman told him no, that he wanted to talk to Burgess about being short in his pay. Watts testified Chapman stated he was tired of Watts not correctly turning in his time worked. Watts testified, "I got, you know, high voiced with him there, the same way he did with me to start with. That's about the extent of it. I said, he'll be here this evening and you can talk to him." Watts also testified he told Chapman that he had shorted him on hours before, but that he had always paid him. Watts testified that Chapman's asking about talking to Burgess had nothing to do with his discharge. He stated the decision to let Chapman go had actually been made 3 days earlier.

Superintendent Hardesty testified that, about 2 weeks before Chapman was discharged, he, Burgess, and Watts talked about ways to maximize profits. Hardesty testified Burgess had asked if the Respondent was creating make work for Chapman when he was not shooting explosives. Hardesty testified he told Burgess that the Respondent was, and that it did not need Chapman 5 days a week. On the day Chapman was discharged, November 24, Watts came to Hardesty and told him that in view of their earlier discussions it was as good a day as any to discharge Chapman. Hardesty testified he told Watts to be sure the Respondent did not need him and that it would not hurt production. Hardesty testified Watts told him Respondent was creating work for Chapman, and that Respondent could get anyone to help Greer set explosive charges. Hardesty testified that he was aware at the time Chapman was discharged that he was slow getting out of the pit area, and that he had problems with the trucks when he drove at the time when the Respondent hauled coal from the pit to the wash area in its own trucks.

Hardesty testified Chapman made no effort to talk with Burgess on the day he was discharged even though he came to the area where Burgess and others were present. Hardesty testified that Chapman did, however, call him that night at home and asked him why he had been discharged. Hardesty testified he told Chapman, "Mac, this is just between you and I, but you know why. You have a personality conflict with James Watts." Hardesty testified it was very obvious that there was a personality conflict between Chapman and Watts. Hardesty testified that Chapman came to him and complained about his hours being shortened. Hardesty testified he told Chapman that it was he, Hardesty, and not Watts, who shortened Chapman on the incident he was complaining about.

Superintendent Hardesty acknowledged on cross-examination that production had stabilized at the mine by August, and that Chapman had accepted and worked overtime as late as the week of his discharge. Hardesty also acknowledged that economic considerations were not the only reasons for discharging Chapman. Hardesty, likewise, acknowledged that a second dragline was started in December, and that driller Johnny Price had been utilized to assist Greer in blasting the overburden from the coal.[7]

Management Consultant Burgess testified he received a telephone call at his home from Chapman on November 24 and, in the conversation, Chapman asked him if he knew why he had been discharged. Burgess testified he told Chapman it was because of a reduction in force. Burgess testified Chapman mentioned that he had heard the Respondent was going to hire a laboratory technician, and he felt he could be trained for the job. Burgess could not recall whether he replied to Chapman or not,

[6] Watts acknowledged that Chapman was never given any written warnings involving any discipline with respect to the trucks. Watts stated that the Respondent did not give written warnings.

[7] Price was hired the first workday after Chapman's discharge.

but that if he did, he probably told him it would take a long time to train an individual for the laboratory.

Burgess asserted that, a few weeks prior to Chapman's discharge, Burgess had a discussion with Superintendent Hardesty and Foreman Watts about manpower, and he told them they ought to reduce their work force. Chapman was doing what Burgess considered to be clean up work. Burgess testified that, after his conversation regarding manpower reduction, nothing else was said about it until Chapman called him at his home. However, Burgess acknowledged he had been told that afternoon, prior to Chapman's call, that Chapman had been terminated.

Counsel for the General Counsel contends that the discharge of Chapman clearly violated Section 8(a)(1) of the Act because Chapman was discharged for engaging in concerted activity protected by the Act. Counsel for the General Counsel contends the concerted activity involved two aspects with one pertaining to wages which concerned the royalty system at the Respondent, and the other aspect involved hours of employment as it related to timekeeping of those hours worked. Counsel for the General Counsel contends that, when the timekeeping matter was brought to the attention of management and a request was made by Chapman to discuss the matter with Management Consultant Burgess, he was discharged. Counsel for the General Counsel contends that the evidence clearly demonstrates that the Respondent had knowledge of Chapman's involvement in both concerted activities. Counsel for the General Counsel contends it is not necessary to show that the individual who acted as spokesperson for the group, i.e., Chapman in the instant case, needed to be authorized or selected by his fellow employees to speak or act on their behalf. Counsel for the General Counsel contends it is only necessary for her to show that the issues discussed were issues of mutual concern to employees and that they involved wages, hours, or working conditions and that they were brought to the attention of management.

Counsel for the General Counsel contends that Chapman was given no reason for his discharge at the time of his discharge, and that, thereafter, he was given varying and conflicting reasons for his discharge. Counsel for the General Counsel argues that it is difficult to figure out the Respondent's defense as it advanced various reasons from various of its witnesses as to why Chapman was discharged.

The Respondent contends that complaining on an individual and personal basis about hours being short and about not being told in advance about the royalty bonus payment changes does not constitute protected concerted activity. The Respondent contends Chapman did not engage in any protected concerted activity. The Respondent further contends it had no knowledge of any concerted activity Chapman allegedly may have engaged in. The Respondent argues the record does not demonstrate it had any knowledge of employees' complaining about work hours. The Respondent also argues that what Foreman Watts meant when he told Chapman that one of the reasons he was being discharged was that he was a troublemaker related to his attitude in general toward Foreman Watts and not any activities on the party of Chapman. The Respondent contends in this regard that Chapman was discharged because he had a personality conflict with Foreman Watts. The Respondent also contends Chapman was not needed on the job because he was doing make work. The Respondent contends that all employees hired since Chapman's termination have been employees with skills for specific jobs that Chapman was not qualified for. The Respondent contends Chapman's discharge was totally free of any unlawful conduct on its part.

With respect to credibility resolutions essential to a disposition of the instant case, it is helpful to note the matters which are not in dispute. It is undisputed that a meeting took place at which it was made known to the employees that two additional individuals would be added to those among whom the royalty bonus would be divided. The evidence establishes that the employees did not discuss the situation at that meeting, but shortly thereafter it was discussed by various employees both among themselves and with management representatives. I credit Chapman's testimony which was corroborated by fellow worker Greer that the two of them in particular discussed the adding of the two additional employees to the bonus split with Foreman Watts in the second week of November. I credit Chapman's testimony that Watts told him in response to the discussion about the royalty split that he, Chapman, "always had something to say about most anything that came up anyway, and that [Chapman] was all the time stirring up trouble and trying to stir up some shit." Watts acknowledged that he had a conversation with Chapman about the royalty split and that Chapman was concerned that the Respondent had taken the action it did without discussing it with the employees first.

It is undisputed that approximately during the third week of November another meeting was held between management and the employees at which a number of work-related items such as holiday pay were discussed. I find that at this meeting a number of employees raised the issue of two additional workers being added to the royalty payments. I credit the testimony of Chapman that he, along with fellow employee Burleson and others, brought the matter up, and that it was expressed by the employees that they were unhappy with the manner in which the two extra employees had been added to the royalty payment list. I find that Chapman also inquired at this meeting about the reinstatement of the 10-percent cut in pay the employees had taken earlier in the year. Chapman's testimony in this respect was corroborated by that of Greer.

I credit the testimony of Burleson, Greer, and Chapman that the employees had discussed among themselves the fact that two additional employees had been added to the royalty bonus payment, and they were concerned about it because they feared it would reduce the amount of money they would receive, and they felt like they were financing a pay increase for the two additional employees the Respondent had added to the royalty bonus money.

I credit Chapman's and Greer's testimony that they had some difficulty in having their hours of work accu-

rately recorded by the Respondent, and they were concerned about it. I, likewise, credit their testimony that they spoke with Foreman Watts about it on November 23. Foreman Watts, in his testimony, acknowledged that Chapman asked him on November 23 if he could speak with Management Consultant Burgess about the timekeeping difficulties that he and Greer were encountering. I credit Chapman's testimony that, when he asked Watts about meeting with Burgess and told him what he wanted to talk with Burgess about, Watts became angry and said that Chapman "always had something to bitch about . . . was always stirring up trouble. That if [Chapman] wanted to talk to Burgess [he] could, but that he would tell [Burgess] about all the times in the morning when [he and Greer] weren't ready to go to work until ten minutes after seven . . . ." Greer corroborated Chapman's testimony and added that when Chapman asked Watts about seeing Burgess with respect to the problems with their hours being properly kept, "well, it got kind of a little heated and I just made the suggestion that we cool it and go back to work." I credit Greer's testimony that Watts also stated before he left the conversation with the two of them that, "If you want to play these kind of games, both of us can play them."

Based on the credited facts taken in conjunction with those not in dispute, it is clear that Chapman and his fellow employees were concerned about and discussed with management as well as among themselves their displeasure with the addition of two individuals to the royalty payments. The discussions clearly involved terms and conditions of employment. Such conduct and actions on the part of Chapman and his fellow employees clearly constituted concerted conduct which is protected by the Act. Likewise, the record is just as clear that Chapman and Greer were concerned about, and discussed among themselves, the timekeeping procedure utilized by the Respondent with respect to hours worked. This concern was voiced by Chapman to the Respondent through Foreman Watts, and an attempt was made to discuss the matter with Management Consultant Burgess. Such conduct on the part of Chapman and Greer was concerted, and inasmuch as it pertained to terms and conditions of employment which was of mutual concern to all employees, it was protected concerted conduct within the meaning of the Act. I am persuaded, based on the fact that Chapman engaged in concerted activity protected by Section 7 of the Act, and based on the fact that he was told he was stirring up things and discharged after he requested to speak with management about the way the hours of work were kept, that counsel for the General Counsel established a prima facie case sufficient to support an inference that protected conduct was a "motivating factor" in the Respondent's decision to discharge Chapman. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Once the General Counsel has established that protected conduct was a motivating factor in the Respondent's decision to discharge Chapman, the burden then shifts to the Respondent to demonstrate the same action would have taken place even in the absence of the protected concerted conduct. I am persuaded, as outlined below, that the Respondent totally failed to meet its burden of demonstrating the same action it took against Chapman would have been taken even in the absence of his protected concerted activity. The most fundamental aspect of the Respondent's failure to meet its burden was demonstrated by the testimony of Foreman Watts that one of the reasons he discharged Chapman was because he was a troublemaker. The record is void of any evidence that Watts ever explained to Chapman what he meant by his considering Chapman to be a troublemaker. I am persuaded that the Respondent's post hoc explanation at trial as to what Watts meant by his statement is of no avail to the Respondent. Watts' attempt at trial to explain that "troublemaker" meant that Chapman gave him what he considered to be "smart" type answers to corrections or comments is nothing more than an after the fact attempt at rationalizing the unlawful actions the Respondent took.

I credit Chapman's testimony that when he called Management Consultant Burgess on the day he was discharged to find out why, he was told by Burgess that he was discharged to make room for a laboratory employee. Even if arguendo the testimony of Burgess was credited that he told Chapman he was being discharged because of a reduction in force and because he was performing make work, I would still conclude that the Respondent's defense in this respect failed. It would fail because, based on the testimony of Greer and corroborated by Superintendent Hardesty, the work had stabilized by August and, therefore, a reduction in force was not necessary. This is further borne out by the fact that the Respondent hired employee Johnny Price the next work day following Chapman's discharge and utilized him, as needed, to work as a shooter's helper. Chapman had occupied the shooter's helper position until his termination. The contention of Burgess that Chapman was performing "make work" is not borne out by the record evidence. For example, Superintendent Hardesty testified that Chapman had been working overtime and in fact had worked overtime the week he was discharged.

The reasons advanced by Watts for the discharge of Chapman in addition to the fact that Watts found him to be a troublemaker were that Chapman, along with fellow employee Greer, had been late starting work on occasion, and that Chapman had problems with the trucks that hauled coal during the time the Respondent delivered its own coal from the pit to the wash area. I credit the testimony of Chapman and Greer that they were never late starting work, but on occasion did not go immediately to their assigned tasks because they had not at the time been given assigned tasks. This record clearly indicates problems existed with all the trucks and, based on the credited testimony of Greer, Chapman encountered no problems that were of a different kind or nature than those encountered by other employees who drove the aged hauling trucks.

Superintendent Hardesty's testimony that the Respondent was looking for a way to maximize its profits and eliminated Chapman because of his having to perform make work is, likewise, not borne out by the record in that Hardesty acknowledged that the Respondent commenced operation of a second dragline after Chapman was discharged. Although no one was hired specifically

to replace Chapman, an employee was hired the next workday after Chapman was discharged, and that employee was utilized when needed as a shooter's helper. Superintendent Hardesty's contention that one of the reasons Chapman was discharged was because of all the problems he had with the trucks when the Respondent was hauling its own coal relates to matters that had taken place some months earlier, and I am persuaded was not one of the reasons for the discharge of Chapman. Hardesty acknowledged that economic considerations were not the only factors leading to the discharge of Chapman.

Finally, the Respondent suggests by way of brief that Chapman was discharged because of a personality conflict between him and Foreman Watts. I am persuaded by the record testimony herein that Chapman's persistence in pressing the matter of the royalty bonus payment and his concern that the employees' hours be properly kept made it unpleasant for Foreman Watts. I am persuaded that whatever personality conflict existed between Watts and Chapman cannot serve as a defense to the Respondent in this case. I am fully persuaded that nothing Chapman did was so out of line as to remove him from the protection of the Act. See *Hamlet Steak House*, 197 NLRB 632 (1972), and *Fairmont Hotel*, 230 NLRB 874 (1977).

Accordingly, I conclude that each of the Respondent's defenses fail to withstand scrunity and that the Respondent's discharge of Chapman on November 24 violated Section 8(a)(1) of the Act inasmuch as Chapman was discharged because he engaged in activities protected by Section 7 of the Act.

CONCLUSIONS OF LAW

1. Cahaba Resources, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act when on or about November 24, 1982, it discharged and thereafter failed and refused to reinstate its employee James Maxwell Chapman for engaging in protected concerted activity.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

It having been found that the Respondent in violation of Section 8(a)(1) of the Act unlawfully terminated the employment of James Maxwell Chapman, I shall recommend that the Respondent be ordered to offer him full reinstatement to his former, or substantially equivalent, position of employment without prejudice to his seniority or other rights and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, it is recommended that the Respondent expunge from its files any reference to the November 24, 1982, discharge of James Maxwell Chapman, and notify him in writing that this has been done and that evidence of his unlawful discharge will not be used as a basis for future personnel action against him. See *Sterling Sugars*, 261 NLRB 472 (1982). It is recommended that the Respondent post the attached notice.

Upon the foregoing findings of fact, conclusions of law, and the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[8]

The Respondent, Cahaba Resources, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any of its employees for engaging in protected concerted activity.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer James Maxwell Chapman immediate and full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent position of employment without prejudice to his seniority and other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the November 24, 1982, discharge of James Maxwell Chapman, and notify him in writing that this has been done, and that the evidence of his unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Post at its Bibb County and Shelby County, Alabama locations copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."